IN THE

Supreme Court of the United States

No. 77-218

OCTOBER TERM, 1977

EXPERT ELECTRIC, INC., HENDRIX ELECTRIC, INC., ARGARD ELECTRIC CORP., ZIP ELECTRIC CO., INC., EUGENE IOVINE, INC., PHASE II ELECTRIC CORP., TAP ELECTRICAL SERVICES AND CONTRACTING, INC., BISANTZ ELECTRIC CO., INC., ROBERT E. BURDEN ELECTRICAL CONTRACTOR, INC., and FIVE STAR ELECTRIC CORP.,

Petitioners,

-against-

LOUIS L. LEVINE, as Industrial Commissioner of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, filed May 12, 1977, which affirmed two orders of the United States District Court for the Southern District of New York, dated July 24, 1975 and November 5, 1976, which dismissed the complaint of the petitioners.

OPINIONS BELOW

The opinions and judgment of the United States Court of Appeals for the Second Circuit were filed in that Court on May 12, 1977, and they are not yet officially reported. Copies of such opinions are printed beginning at page 19a of the Appendix herein.

The first opinion of the District Court of the United States for the Southern District of New York (Robert L. Carter, J.) is dated July 24, 1975. It is officially reported in 399 F. Supp. 2d 893, and it is printed in the Appendix herein, beginning at page 1a.

The second opinion of the District Court of the United States for the Southern District of New York (Robert L. Carter, J.) is dated November 5, 1976, and it is not yet officially reported. That opinion is printed in the Appendix herein, beginning at page 14a.

JURISDICTION

This petition for certiorari to review the judgment of the United States Court of Appeals for the Second Circuit filed May 12, 1977, is timely being made within 90 days of the filing of such judgment.

The jurisdiction of this Court to review such judgment is invoked pursuant to 28 U.S.C. section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the 14th Amendment to the Constitution of the United States, in part, provides:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

At all times relevant to the issues herein, New York statutes provided:

§ 811. Powers and duties of industrial commissioner; personnel

1. The industrial commissioner shall have the following powers and duties:

(a) to encourage and promote the making of apprenticeship agreements conforming to the standards established by or pursuant to this article;

(b) to establish suggested standards for apprenticeship agreements in conformity with the provisions of this article;

(c) To supervise the execution of apprenticeship agreements and maintenance of standards;

(d) to register approved apprenticeship agreements, and upon performance thereof, to issue certificates of completion of apprenticeship;

(e) to settle differences arising out of apprenticeship agreements, when such differences cannot be adjusted locally or in accordance with established trade procedure;

(f) to terminate or cancel any apprenticeship agreements in accordance with the provisions of such agreements;

(g) to encourage and promote the hiring by any trade or group of trades of persons who are on parole, in order to aid in the rehabilitation of such persons;

(h) to study and disseminate information on apprenticeship training, trends of employment opportunities in various trades, the impact of technological change on skill levels and requirements, the supply of and needs for skilled manpower, and related matters;

(i) to cooperate with the federal government, the state education department, the state department of commerce and other agencies, public and private in the state;

(j) to adopt such rules and regulations as may be necessary for the effective administration of the purposes and provisions of this article;

(k) to perform such other duties as may be necessary to give full effect to the policies of the state and the provisions of this article.

2. The industrial commissioner shall appoint a person who shall be in charge of apprentice training in the department of labor, and who shall act as secretary of the state apprenticeship and training council and of state joint apprenticeship committees. The industrial commissioner is further authorized to appoint such clerical, technical, and professional assistants as shall be necessary to effectuate the purposes of this article. The personnel appointed under this article shall receive an annual compensation to be fixed by the industrial commissioner within the amount provided by appropriation. (Labor Law, section 811)

§ 816. Apprenticeship agreements

For the puroses of this article an apprenticeship agreement is:

(1) An individual written agreement between an employer and an apprentice, or (2) a written agreement between an employer or an association of employers, and an organization of employees describing conditions of employment for apprentices or (3) a written statement describing conditions of employment for apprentices in a plant or plants where there is no bona fide employee organization. (Labor Law, section 816)

§ 517. Liabilities of members

(a) The members of a corporation shall not be personally liable for the debts, liabilities or obligations of the corporation.

(b) A member shall be liable to the corporation only to the extent of any unpaid portion of the initiation fees, membership dues or assessments which the corporation may have lawfully imposed upon him, or for any other indebtedness owed by him to the corporation. No action shall be brought by any creditor of the corporation to reach and apply any such liability to any debt of the corporation until after final judgment shall have been rendered against the corporation in favor of the creditor and execution thereon returned unsatisfied, or the corporation shall have been adjudged bankrupt, or a receiver shall have been appointed with power to collect debts, and which receiver, on demand of a creditor to bring suit thereon, has refused to sue for such unpaid amount, or the corporation shall have been dissolved or ceased its activities leaving debts unpaid. No such action shall be brought more than three years after the happening of any one of such events. (Not-for-profit Corporations Law, section 517)

Regulation 601.8 of the Department of Labor of the State of New York, adopted June 3, 1974, provided (33):

> "Reinstatement of Program Deregistration. Any apprenticeship program formally deregistered pursuant to this Part may not be reinstated for a period not to exceed 3 years, nor shall the sponsor or any employer or union participant be eligible to register any apprenticeship training program under any other name for such period."

QUESTIONS PRESENTED

1. Does *res judicata* bar this suit by the petitioners for a judgment that Regulation 601.8 of the Department of Labor of the State of New York unconstitutionally disqualified them from exercising their statutory right under sections 811 and 816 of the New York Labor Law to register with the New York State Department of Labor each petitioner's apprentice training agreement with its own employees, by providing that for a period not exceeding three years after the Labor Department has deregistered an apprentice training agreement, no employer or union participant therein shall be eligible to register any apprenticeship training program under any other name, where the Labor Department has made an administrative determination that a local labor union and an incorporated employers' association in which petitioners were members violated apprentice training regulations, and the Labor Department deregistered that apprentice training Agreement for such violations, and the Appellate Division of the New York Supreme Court judicially confirmed that administrative determination?

2. Did the New York Labor Department unconstitutionally deprive each petitioner individually of substantive and procedural due process under Regulation 601.8, by disqualifying each of them, individually, from registering with the Labor Department their own apprentice training agreements with their own employees, without any charge, hearing or determination that the petitioners authorized, ratified or participated in the alleged violations for which the Labor Department deregistered the apprentice training agreement between a labor union and an incorporated employers' association in which the petitioners were members?

3. Did the Labor Department unconstitutionally discriminate against the petitioners, and deny to them the

equal protection of the laws?

The aforesaid constitutional questions of law were presented in the complaint, at pages 34-35 and at pages 37-38 of the record in the Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

The Facts

Petitioners are electrical contractors, doing alteration and repair electrical work under contracts with commercial firms in private industry, and also doing more than $10,000.00 of governmental work annually under contracts with agencies of the Federal, New York State and New York City governments (A31).

Petitioners were members of United Construction Contractors Association, Inc., ("United") which made an agreement with Local 363, International Brotherhood of Teamsters ("Local 363"), whose members include journeymen and apprentice electricians, for training of apprentice electricians by their Joint Apprenticeship Committee ("JAC"). That agreement was registered by the Labor Department in 1971, as a continuation of registration of prior similar agreements beginning in 1961 (A31).

Section 811(d) of the New York Labor Law empowers the Labor Department to register apprenticeship agreements and individual apprentices (A31).

In 1975, each petitioner employed one or more registered apprentice electricians (A31).

On or about June 17, 1974, the respondent caused to be served on United, and on Local 363, a notice of proposed deregistration of their apprentice training agreements, which stated, in part, that United, Local 363, JAC (A41-44):

> "1. failed to meet its responsibilities under its master Apprenticeship program in that it failed to

complete the training of apprentices so as to qualify as journeymen, in contravention of the purposes of Article 23 and specifically Section 810 of the said Article.

2. The following employers, members of the Joint Apprenticeship Committee have violated Article 8 of the Labor Law and the Apprenticeship Training Regulations in that they have failed to pay prevailing wages and supplements, employed unregistered apprentices, used apprentices in excess of the ratio provided in the apprenticeship agreements for the geographical area in which the work was performed: Abetta Electric Service Corporation ***; Unity Electric Service Corporation ***; Iovine, Inc., *** Hylan Electric Co., Inc. ***; Gottlieb Contracting Co., Inc. *** Franco Electric Corp., ***; Mansfield Electric ***."

Respondent held hearings on the said charges, by an Advisory Council on Apprenticeship Training.

On May 1, 1975, respondent approved a report by such Advisory Council on Apprenticeship Training, and cancelled the Labor Department's registration of the apprentice training agreement between United and Local 363 (A45-54).

On June 3, 1974, defendant amended his apprentice training regulations to read, in part, as follows (A33):

> Section 601.8.
>
> "*Reinstatement of program registration.* Any apprenticeship program formally deregistered pursuant to this Part may not be reinstated for a period not to exceed 3 years, nor shall the sponsor *or any employer* or union participant be eligible to register any apprenticeship training program under any other name for such period." (Emphasis supplied)

Pursuant to defendant's above-quoted amended regulations, his aforesaid administrative determination of May 1, 1975, automatically cancelled the Labor Department's registration of each apprentice electrician whom each petitioner then employed; and it automatically disqualified each petitioner for a period not to exceed three years, from registering with the Labor Department an apprenticeship training agreement in its own name as employer (A31-32), although section 816 of the New York Labor Law provides, in part:

> "For the purposes of this article an apprenticeship agreement is: (1) An individual written agreement between an employer and an apprentice, ***."

None of the petitioners committed any of the acts alleged in respondent's notice of proposed deregistration, in that none of them failed to pay prevailing wages and supplements, employed unregistered apprentices, or used apprentices in excess of the ratio provided in the apprenticeship agreement (A34; A57-58; A70-71).

None of the petitioners agreed to, authorized, ratified, or participated in any of the acts alleged in the notice of proposed deregistration, or had knowledge thereof (A34; A57-58; A70-71).

Section 811 of the New York Labor Law, in part, provides:

> "1. The industrial commissioner shall have the following powers and duties:
>
> * * *
>
> (d) to register approved apprenticeship agreements, and upon performance thereof, to issue certificates of completion of apprenticeship; ***."

Petitioners alleged that section 601.8 of respondent's regulations, and his actions under color thereof, and under color of section 811 of the New York Labor Law, following

his determination of May 1, 1975, which cancelled his registration of the apprenticeship training agreement between United and Local 363, in disqualifying each petitioner from registering its own apprentice training agreement with persons whom it wishes to employ as apprentice electricians, unconstitutionally ascribed to each plaintiff guilt by association for acts allegedly performed by certain named employers other than these plaintiffs, and for improper supervision of apprentice training by United and Local 363, and thereby the said Regulations, and respondent's actions implementing his Regulations, deprived each petitioner of liberty and property without due process of law, contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States, and, consequently, the said Regulation, and defendant's actions implementing it, are unconstitutional and invalid (A34-A35).

Prior Administrative Proceedings

Petitioners, as individual contractors, were not named by respondent as parties to any administrative proceeding; and the respondent made no administrative determination which named the petitioners.

On June 17, 1974, the respondent commenced an administrative proceeding in the Labor Department by serving notice of proposed deregistration upon United and Local 363.

Thereafter, the respondent conducted evidentiary hearings in the Labor Department, by an Advisory Council on Apprenticeship Training, which he appointed, and which consisted of three officials of AFL building trade unions, and three building contractors who employed members of AFL building trade labor unions. No member or officer of a Teamsters' Union served on such Advisory Council.

On May 1, 1975, the respondent made an administrative

determination which approved and adopted a report by the said Advisory Council on Apprentice Training, which sustained the charges against United and Local 363, and cancelled the Labor Department's registration of the apprentice training agreement between United and Local 363.

After the New York Courts confirmed the said administrative determination on June 2, 1976, 52 A.D.2d 371, the respondent issued an administrative order that contractors who were members of United will be disqualified from employing registered apprentices for three years from June 2, 1976, namely, until June 2, 1979.

Prior State Court Litigation

On July 2, 1975, United and Local 363 commenced a proceeding against the respondent under Article 78 of the New York Civil Practice Law and Rules for judicial review of the respondent's administrative determination of May 1, 1975, which sustained charges against them, and cancelled the Labor Department's registration of their apprentice training agreement.

On June 2, 1976, the Appellate Division, Third Department, of the New York Supreme Court, confirmed the said administrative determination, 52 A.D. 2d 371. Thereafter, the Court of Appeals of the State of New York denied leave to appeal to that Court, and thereby the said State court litigation terminated on July 16, 1976.

Prior proceedings in this case in the District Court, and in the Court of Appeals

On May 22, 1975, the summons and complaint in this action was filed in the District Court for the Southern District of New York; and petitioners made a motion for a preliminary injunction, restraining the respondent from

disqualifying them from registering their own apprentice training agreements with their own apprentices.

Without serving an answer, the respondent made a cross-motion to dismiss the complaint under Rule 12, F.R.C.P.

The District Court (Carter, J.) heard oral argument on such motion and cross-motion, after which it dismissed the complaint by memorandum decision and order No. 42854, dated July 24, 1975.

By notice of appeal dated August 4, 1975, petitioners appealed from the said order, and they docketed the said appeal as No. 75-7462.

Thereafter, on petitioners' motion, the Court of Appeals made an order, dated September 2, 1975, which remanded the case to the District Court for the purpose of applying to that Court to vacate the judgment dismissing the complaint, and for a rehearing.

On November 6, 1975, the District Court granted a rehearing, which it held on March 3, 1976, on which date it heard oral argument, and then directed a stay of proceedings in this action until after the decision in the case of "United Construction Contractors Association v. Levine", which was awaiting oral argument of an appeal to the Appellate Division, Third Department of the New York Supreme Court.

On June 2, 1976, that Court made a decision which confirmed the respondent's administrative determination of May 1, 1975, which deregistered the apprentice training agreement of United, Local 363, JAC; and the Court of Appeals of the State of New York denied leave to appeal to that Court, terminating that litigation on July 16, 1976.

On June 29, 1976, the respondent again made a motion to dismiss the complaint, and for summary judgment on the ground that the Appellate Division decision in *United Construction Contractors v. Levine*, 52 A.D.2d 371, was *res judicata*.

By a decision filed November 8, 1976, the District Court (Robert L. Carter, J.) granted the motion and dismissed the complaint.

Petitioners appealed to the Court of Appeals which affirmed the judgment dismissing the complaint and said that in disqualifying each petitioner from registering its own apprentice training agreement with its own employees, the Labor Department only imposed on each petitioner the natural consequence and legal effect of its membership in the incorporated employers' association, and it did not affect any status or right which is peculiar and personal to each petitioner; and that, there was such identity of parties and issues between the prior administrative determination followed by the State court judgment confirmation thereof, and this subsequent Federal suit, as barred this suit as *res judicata*.

REASONS FOR GRANTING THE WRIT

1(a) Differences in issues presented in this case, and in the prior case in State Court: no *res judicata*. The complaint shows on its face that the issue presented by the complaint in this case is entirely different from the issues that were presented and decided in the prior administrative proceeding and in the judicial confirmation thereof by the State court in *United Construction Contractors Association v. Levine*, 52 A.D. 2d 371.

The complaint in this case alleged (34-35):

> "***the provisions of Sections *** 601.8 of the said Regulations, that upon the making of a determination deregistering an apprentice training program, *** no employer or union which participated therein shall be eligible to register any apprenticeship training program under any other name for three years *** deprived each plaintiff of liberty and property without due process of law,

> contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and, consequently, the said Regulations, and defendant's actions implementing them, are unconstitutional and invalid."

No such allegation was made in the State Court petition in *United Construction Contractors Association* v. *Levine, supra*, 52 A.D. 2d 371; and the decision in that case did not mention Regulation 601.8 or decide the constitutionality of its provision that upon deregistration of an apprentice training agreement between a labor union and an employer's association, each employer member of such employers' association shall be disqualified for a period not exceeding three years from registering its own apprentice training agreement with its own employees.

The three decisions below in this case also did not discuss or decide the constitutionality of the aforesaid disqualification provision in Regulation 601.8, although the above-quoted allegations of the complaint herein plainly presented the constitutionality of such provision as the principal question for decision.

The Circuit Court's decision said that the Labor Department's administrative determination:

> "operates against the employer association and appellants only insofar as they are members. The state is neither seeking to hold these litigants accountable for the acts of others nor impose a penalty."

We submit that the Circuit Court's above-quoted statement erroneously gives no effect to the provision in the Labor Department's Regulation 601.8 that:

> "for a period not to exceed three years *** (no) employer or union participant (shall) be eligible to register any apprenticeship training program under any other name ***."

We submit that Regulation 601.8 imposes a penalty against each petitioner and seeks to hold each petitioner civilly responsible for the acts of others by disqualifying them, as individuals, from exercising the statutory right given to each of them individually—in addition to, and apart from their membership in the employer's association—by sections 811 and 816 of the New York Labor Law, to make individual apprentice training agreements with their own employees, and to register such individual apprentice training agreements with the State Labor Department.

It is the constitutionality of this disqualification from exercising such right for three years, provided by Regulation 601.8, that the complaint in this case presents for decision; and this was not presented for decision in the prior administrative proceeding, nor in the prior State Court judicial confirmation of the administrative determination.

The Circuit Court's decision herein, and the two decisions of the District Court, completely overlook the fact that sections 811 and 816 of the New York Labor Law give to an employer an individual right to make and to register with the State Labor Department his own apprentice training agreement with his own employees, and, also, a right to join an employer's association, which on behalf of its members makes an apprentice training agreement with a labor union for training of apprentices, and such employer's association and labor union jointly register such agreement with the State Labor Department, and jointly administer such apprentice training agreement.

We submit that deregistration of such employer-union apprentice training agreement for apprentice training violations can not constitutionally have the effect of disqualifying each employer member from making and registering with the State Labor Department its own apprentice training agreement with its own employees, otherwise each employer will be held civilly responsible and

disqualified for the acts of the trade association, the labor union, and one or more other employers, without any evidence that it authorized, ratified or participated in the acts for which the Labor Department deregistered the joint apprentice training agreement between the labor union and the employer's association.

The United Construction Contractors' Association, in which each petitioner was a member, was a corporation, incorporated under the New York Not-For-Profit Corporation Law, in which section 517 at all times provided:

> (a) The members of a corporation shall not be personally liable for the debts, liabilities or obligations of the corporation.
> (b) A member shall be liable to the corporation only to the extent of any unpaid portion of the initiation fees, membership dues or assessments which the corporation may have lawfully imposed upon him, or for any other indebtedness owed by him to the corporation. No action shall be brought by any creditor of the corporation to reach and apply any such liability to any debt of the corporation until after final judgment shall have been rendered against the corporation in favor of the creditor and execution thereon returned unsatisfied ***.

In Coe v. Armour Fertilizer Works, 237 U.S. 413-423, (1914), it was decided that a similar Florida statute did not make *res judicata* against a stockholder a money judgment rendered by a Florida court against a Florida corporation. The Court said:

> "It may be conceded that a judgment recovered against a corporation, without fraud or collusion, in a court having jurisdiction over the subject-matter and the party, may consistently with the Fourteenth Amendment be treated as concluding the stockholder respecting the existence and

> amount of the indebtedness so adjudged (citations). But before a third party's property may be taken to pay that indebtedness upon the ground that he is a stockholder and indebted to the corporation for an unpaid subscription, he is entitled, upon the most fundamental principles, to a day in court and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and *other defenses personal to himself.*" (emphasis supplied)

In this case, as in the *Coe* case, *supra*, each petitioner has "defenses personal to himself" which make inapplicable to each petitioner, as a basis for personal disqualification of each petitioner from registering its own apprentice training agreements with its own employees, the prior administrative determination and the State Court confirmation thereof which deregistered the apprentice training agreement between the labor union and the incorporated employers' association in which each petitioner was a member.

Such personal defenses consist of the fact that each petitioner did not authorize, ratify or participate in the alleged apprentice training violations found by the Labor Department in its administrative determination for which it deregistered the apprentice training agreement between the labor union and the employers' association.

In *Kersh Lake District* v. *Johnson*, 309 U.S. 485, 494-495 (1939), holders of unpaid certificates of indebtedness issued to pay for improvements, sued the District in Federal court and obtained judgment directing the District to levy and to collect additional tax to pay such certificates. Thereafter, two individual landowners obtained judgments in the State court that their lands were not subject to additional tax to pay such certificates, because they had paid in full the assessment on their lands for their

proportionate share of the cost of such improvements. The Court held that such State court judgments were not barred by the prior judgment of the Federal district court. The Court said:

> "The fact that the Commissioners, in the injunction proceedings against the District, unsuccessfully attempted to interpose defenses *peculiar and personal to the individual landowners* cannot foreclose the individual landowners, who were not present, from thereafter pleading a defense otherwise valid. Certainly, the decree in the injunction suit in the federal court would not prevent an individual property owner from subsequently interposing the defense that his property was not in fact included within the Drainage District. *Cognate personal defenses* such as the one that a landowner's proportionate drainage tax liability has been declared by the judgment of a competent tribunal to have been 'ascertained and paid,' *were not foreclosed by the Federal District Court's judgment.*"

We submit that in this case, too, the petitioners' personal allegations in their complaint that they did not authorize, ratify or participate in the alleged apprentice training violations which the Labor Department determined to have been committed by the labor union and the employers' association in their joint administration of their apprentice training agreement, set forth a legally sufficient cause of action for judgment declaring that the Labor Department's Regulation 601.8 unconstitutionally disqualified them from registering with the Labor Department their own apprentice training agreement with their own employees.

1(b). *Petitioners' lack of standing to participate, as parties, in the administrative hearing, and in the suit for judicial review of the administrative determination.*

In support of his motion to dismiss the complaint, the respondent said that notice of administrative hearing on disciplinarq charges was mailed to all the members of the employers' association, including the petitioners (65).

We submit that such casual notice of an administrative hearing on disciplinary charges, which was addressed to the labor union, and to the employers' association, but not to individual members of the employers' association, such as each petitioner herein, does not have the legal effect of binding each petitioner with respect to its own personal rights and status, with the administrative decision on such disciplinary charges, nor with the State court's judicial confirmation thereof.

In *Coe* v. *Armour Fertilizer Works, supra,* 237 U.S. 413, 424-425 (1914), the Court said that:

> "extra-official or casual notice, or a hearing granted as a matter of favor or discretion" cannot "be deemed a substantial substitute for the due process of law that the Constitution requires."

Petitioners lacked standing to participate in or to intervene in the administrative hearing, and in judicial review of the administrative determination.

In *Fox Publishing Corp.*, v. *United States,* 366 U.S. 683, 691(1960), it was held that the plaintiff, a member of the American Society of Composers, Authors and Publishers, ("ASCAP"), had no legal right to intervene in a pending anti-trust action in which a consent judgment was being negotiated in favor of the United States against ASCAP. The Court said:

> "*** before the inadequacy of ASCAP's representation of appellants' interests in the consent decree negotiations can give rise to a right of intervention, appellants must further demonstrate that they are or may be bound by the judgment on the litigation.***

> "*** appellants' arguments as to a divergence of interests between themselves and ASCAP proves too much, for to the extent that it is valid appellants should not be considered as members of the same class as the present defendants, and therefore not 'bound'."

See, also, to the same effect: *Bailey* v. *Richardson*, 341 U.S. 918 (1950); *Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 186 (1950; concurring opinion by Jackson, J.).

The Circuit Court's opinion cited Dunkel v. T. B. McDonald Construction Co., 67 N.Y.S. 2d 515, 517 (N.Y. Sup. Ct., 1946). But the Dunkel case whose facts closely resemble the facts in this case, completely supports petitioners' argument that a member of an association (unincorporated in this case) is personally liable only for obligations of the association in which he has participated, or which he has authorized or ratified. The Court said:

> "The complaint alleges that the association is comprised of employer-contractors who do substantially one hundred percent of the painting, building, drapery and prop work for stage productions in the metropolitan area; that the association has informed its members not to work jointly with plaintiff, who is a painting contractor or scenic artist, and that the defendants refused to work jointly with plaintiff on any job, thereby causing damage to plaintiff. ***
> In the action brought against the association, the plaintiff was required to prove that he had a cause of action 'against all the associates.' General Associations Law, §13. But it is clear from the applicable provisions of the General Associations Law that the judgment could be issued against the individual person or property of the officer against whom the action was brought in a representative

> capacity. General Associations Law, §15. And it is expressly provided that an action brought against individual members of an association, after the association has failed to satisfy a judgment, is to be maintained 'as if the first action had not been brought.' General Associations Law, §16(1); cf. §16(2). The cases and commentators have uniformly interpreted this provision to mean that the recovery of a judgment against an association does not establish the personal liability of its members." (citations).

2. *Unconstitutional disqualification of the petitioners by Regulation 601.8.*

The Labor Department's refusal to register each petitioner's individual apprentice training agreement with its own employees, under its Regulation 601.8, on the ground that its deregistration of the apprentice training agreement between the labor union and the employers' association in which each petitioner was a member, automatically disqualified each employer member of the employers' association for up to three years from registering its own apprentice training agreement with its own employees, unconstitutionally deprived each Petitioner of liberty and property without due process of law, by applying to each Petitioner an irrebuttable conclusive presumption that each Petitioner agreed to, authorized, ratified, or participated in the acts which the Labor Department charged and found against United, Local 363, JAC, as its reasons for deregistration of their apprentice training program.

Such irrebuttable conclusive presumption was contrary to the allegations in the complaint (A34), in the supporting affidavit (A57), and in petitioners' Statement under District Court Rule 9(g) (A70-71), that the petitioners did not authorize, ratify, participate in or have knowledge of such acts.

Members of an association or corporation can not-constitutionally be held individually legally responsible criminally or civilly, or be disqualified, or made ineligible for a statutory benefit or privilege, upon an administrative or judicial determination that the association or corporation of which they are members committed a crime, or some wrongful civil act which disqualified it from such statutory benefit, privilege or activity.

Instead, it is necessary to show that the individual member whom the Government seeks to hold criminally or civilly responsible for actions of the corporation or association of which he is a member, or to whom it seeks to deny eligibility for a statutory benefit or privilege because of actions by a corporation or association of which he is a member, authorized, ratified, or participated in the actions for which such corporation or association was adjudged criminally or civilly responsible, or for which it was denied eligibility for a statutory benefit or privilege.

In *United States* v. *Brown* 381 U.S. 437, 455-456 (1964), the Court said:

> "In a number of decisions, this Court has pointed out the fallacy of the suggestion that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list of undesirable characteristics. For, as the Court noted in Schneiderman v. United States, 320 U.S. 118, 136, 'under our traditions beliefs are personal and not a matter of mere association and . . . men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles".

In *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 179 (1950), a concurring opinion by Mr. Justice Douglas said:

> "Guilt under our system of government is personal. When we make guilt vicarious we borrow

> from systems alien to ours and ape our enemies. These short-cuts may at times seem to serve noble purposes; but we depreciate ourselves in indulging in them."

In *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 246 (1956), the Court said:

> "*** it cannot automatically be inferred that all members share their evil purposes or participate in their illegal conduct."

In *Hartford Empire Co.*, v. *United States*, 323 U.S. 386, 405-406 (1944), the Court said:

> "There is no evidence that, as a director of Hartford, he knew, approved, or voted in favor of any of the actions taken pursuant to the conspiracy. *** Collins is found to have been, and still to be, a member of the Association's statistical committee, but the bill does not charge him individually with any conduct in that relation. Of course, any injunction against the Association and its officers and agents will bind him so long as he remains in that relationship. *** the evidence is not persuasive of participation in any conspiracy charged or proved. We are of opinion that as to Collins, the bill should be dismissed."

In *Vandervelde* v. *Put & Call Brokers & Dealers Association*, 344 F. Supp. 118, 155, 156 (S.D.N.Y. 1972), the Court said:

> "The key element of proof for linking an Association member to the acts of his organization is a showing that he knew of and condoned the acts in issue.***
> The evidence as to Krinski & Co., however, is insufficient to justify a finding of liability. Krinski played no direct or indirect role in the Vandervelde controversy and the firm itself, under these circumstances, has not been shown to have any

connection to the matters at issue except that of a 'mere member'. The complaint is dismissed as to Krinski & Co."

In *Gem Music Corp.*, v. *Taylor*, 294 N.Y. 34, 37, the Court said:

"This first cause, it will be observed, does not assert that any of the corporate defendants participated in the alleged conspiracy or ratified that wrong or profited therefrom. Indeed this first cause does not even impute knowledge of the existence of such a conspiracy to any of the corporate defendants."

See, also: ***Sperry Products, Inc., v. Association of American Railroads***, 132 F. 2d 408 (C.A. 2, 1941), certiorari denied 319 U.S. 744 (1942).

II.

In its notice of proposed deregistration, the Labor Department alleged the following grounds for deregistering the apprentice training agreement of United, Local 363, JAC (A41-44):

"1. The United Construction Contractors Association, Inc., and Local #363, International Brotherhood of Teamsters Joint Apprenticeship Committee has failed to meet its responsibilities under its master Apprenticeship program in that it failed to complete the training of apprentices so as to qualify as journeymen, in contravention of the purposes of Article 23 and specifically Section 810 of said Article.
2. The following employers, members of the Joint Apprenticeship Committee have violated Article 8 of the Labor Law and the Apprenticeship Training Regulations in that they have failed to pay

prevailing wages and supplements, employed unregistered apprentices, used apprentices in excess of the ratio provided in the apprenticeship agreements for the geographical area in which the work was performed: Abetta Electric Service Corporation***; Unity Electric Co.***; Iovine, Inc.***; Hylan Electric Co. Inc.***; Gottlieb Contracting Co. Inc.***; Franco Electric Corp.***;

In its administrative determination, the Labor Department made the following Findings (A53):

"Based upon the whole record I find:
1. From the inception of the program in 1961 until 1973, not one of the 574 apprentices achieved completion of the program or certifiable journeymen status.
2. The sponsor not only failed to meet his obligations to provide related classroom instruction but by its own actions made it impossible for any apprentice to obtain the necessary 144 hours of related classroom instruction.
3. The sponsor in a Joint Apprenticeship Committee consists of the union and each contractor having a collective bargaining agreement with said union. Therefore the acts of each participating contractor in an apprenticeship program is attributable to the sponsor.
4. The sponsor failed to take any substantial corrective action with respect to violations of the Labor Law despite the fact that such violations were matters of public record.
5. The record indicates that the sponsor, after agreeing to correct deficiencies in the program, failed to do so."

In its above-quoted charges against United, Local 363, JAC, the Labor Department did not allege that any of the

individual petitioners herein (except Eugene Iovine, Inc.), committed any violations of apprentice training regulations or labor laws; and it made no such finding.

While the Labor Department's above-quoted notice of proposed deregistration alleged that Eugene Iovine, Inc., committed (A42): "Underpayment of prevailing rates. Failure to use apprentices in the proper ratio", its above-quoted Findings show that it made no finding to such effect (A53).*

We submit that under the cases cited and quoted above, the Labor Department could not constitutionally disqualify each petitioner from registering its own apprentice training agreements with its own apprentices, by adopting a regulation that disqualification of a trade association shall automatically disqualify all its members from registering an apprentice training agreement, and thereby substitute a conclusive presumption that each member of the association authorized, ratified or participated in the association's violations of apprentice training regulations and labor laws, for evidence of wrongful or illegal acts committed by a named member of the association, or that he authorized, ratified or participated in the association's wrongful or illegal acts, which the Constitution requires in order to hold an individual member legally responsible for acts committed by the association, or by other members.

III.

The District Court's decision #45343, dated November 5, 1976, said (A29):

> "*** plaintiffs' claim that they were denied due process because they have been held responsible for acts of JAC, United and Local 363 which they

*Eugene Iovine testified at the administrative hearing that his firm did not commit the acts alleged against it.

> did not authorize, ratify or participate in, was alleged in the 12th paragraph of the state court petition, and rejected by the court when it stated that 'the administrative determination to adopt regulation section 601.7(c) has reasonable basis in law and must be sustained'."

But the complaint herein seeks to invalidate Regulation 601.8, and not Regulation 601.7(c), on the ground that 601.8 unconstitutionally disqualifies the petitioners by providing that for three years after the Labor Department deregisters an apprentice training program:

> "*** the sponsor or any *employer* or union *participant* (shall not) be eligible to register any apprenticeship training program***." (emphasis supplied)

Therefore, the State Court's decision sustaining the validity of Regulation 601.7(c) does not support the validity of Regulation 601.8, which unconstitutionally disqualified members of any employers' association, not for their own acts, but solely on the basis of their membership in an employers' association whose apprentice training agreement was deregistered by the Labor Department.

Petitioners recognize that as members of United they are bound by the Labor Department's administrative determination sustaining its charges against United, Local 363, JAC, and deregistering United's apprentice training agreement. Petitioners also recognize that they are bound by the State Court's judgment confirming that administrative determination, and that under regulation 601.7(c) such judicially confirmed administrative determination terminated petitioners right to employ registered apprentices under such cancelled registration.

However, petitioners allege in their complaint that regulation 601.8 unconstitutionally disqualified them from registering their own apprentice training agreements, solely

on the ground that they were "employer participants" in the deregistered apprentice training agreement of United, Local 363, JAC.

IV.

The District Court's decision #42854, dated July 24, 1975, said (A16):

> "It is fundamentally disingenuous for these plaintiffs, who have reaped the benefits of the apprenticeship program, now to argue that they are free from the statutory and regulatory commitments and restrictions which the Master Agreement bound the participants to observe and from the consequences of failing to do so."

In support of its above-quoted statement, Decision #42854 quoted *Phelps Dodge Refining Corp., v. FTC,* 139 F. 2d 393, 396-297 (C.A.2, 1943), where the Court said:

> "Granted that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to dissociate himself from them is a ratification of what they are doing."

The *Phelps Dodge* decision further said (139 F. 2d at 396):

> "The stipulation of facts states that the Association, organized in 1934, has acted as a clearing house for the exchange of information submitted by its members, including reports as to the sales of various types of insecticides, fungicides and related items, together with the prices, terms and discounts at which said items are sold, or offered to be sold, and in some instances including advance notice of future prices. Thus it admits of

> no doubt that the association and *some of its members* were engaged in price fixing." (Emphasis supplied)

In this case, unlike the *Phelps Dodge* case, the complaint and petitioners' Statement under District Court Rule 9(g) expressly alleged (A34; A57; A70-71), that no petitioner authorized, ratified, participated in or had knowledge of the acts alleged in respondent's notice of proposed deregistration as grounds for deregistering the apprentice training agreement of United, Local 363, JAC.

In the *Phelps Dodge* case, the Court further said (139 F. 2d at 396-397):

> "All that the record discloses about petitioner Demmon is that he was a director of the association and held some unnamed office in Stauffer. It does not appear that he ever attended a directors' meeting or knew anything about the illegal activities of the association or the supplying and receipt of price lists and dealer lists by Stauffer. The ordinary doctrine is that a director, merely by reason of his office, is not personally liable for the torts of his corporation; he must be shown to have personally voted for or otherwise participated in them (citations). The doctrine seems applicable here. The finding against the petitioner Demmon is therefore unsupported, and his inclusion by name in the order is not sustained."

V.

The District Court's decision #42854, dated July 24, 1975, also said (A17):

> "It is simply incredible for plaintiffs to contend that they were unaware of the massive violations

which the hearing panel found and the Commission endorsed."

Although the complaint was served in May, 1975, the respondent has not yet served an answer, or any affidavit denying the allegations in the complaint, the supporting affidavit, or petitioners' Statement under District Court Rule 9(g) (A34; A70-71), that no petitioner authorized, ratified, participated in, or had knowledge of the acts alleged in respondents notice of proposed deregistration as grounds for deregistering the apprentice training agreement of United, Local 363, JAC.

Upon respondent's first notice to dismiss the complaint, filed May 30, 1975, the rules required the allegations of the complaint to be deemed admitted, for the purpose of that motion. Yet, the first District Court decision declared "incredible" petitioners' allegation that they did not authorize, ratify, participate in or have knowledge of the acts alleged in respondent's notice of proposed deregistration.

Upon respondent's second motion to dismiss the complaint, and for summary judgment, filed June 29, 1976, respondent did not file a statement under District Court Rule 9(g) of facts which he deemed admitted; and he did not contradict petitioners' Statement under Rule 9(g), which listed among factual issues which required a trial and thus precluded summary judgment, a statement that no petitioner authorized, ratified, participated in, or had knowledge of the acts alleged in respondent's notice as grounds for deregistering the apprenticeship agreement of United, Local 363, JAC.

VI.

The District Court's decision #42854, dated July 24th, 1975, also said (A17):

> "The fact that not one of the 574 apprentices achieved completion of the training program during a span of a dozen years, and that not one completed 144 hours of required related instruction should have put each participating employer upon inquiry notice that the sponsor and participating employers were not fulfilling their obligations under the program. Plaintiffs' failure to dissociate themselves from the sponsor is thus a ratification of the condemned activities. 139 F. 2d at 396. Plaintiffs' first due process contention is devoid of merit."

Undisputed testimony in the administrative hearing by Henry Burfeind, supervisor of vocational training of the Board of Education of the City of New York, contradicted the Labor Department's charge that no apprentice completed the training program. Mr. Burfeind testified (T402-404):

> "It would not be correct to say that no student completed the—had completed satisfactorily the course of study that we had prescribed for this apprentice."

Undisputed documentary evidence in the administrative hearing established that when the Labor Department told United, Local 363, JAC, that apprentices were required to attend evening classroom instruction for two sessions of two hours each twice weekly, for 36 weeks per year, amounting to 144 hours per year, instead of one 3-hour session weekly, times 36 weeks, amounting to 108 hours yearly, they complied immediately and wrote to the Labor Department on November 20, 1973 (T488-491; Dept. Exh. 18) that apprentices:

> "will complete 144 hours of related instruction by the end of June, 1974, with the cooperation of the Board of Education as discussed in our meeting of October 13, 1973."

The Labor Department's administrative findings that no

apprentice completed the training program, and that United, Local 363, JAC, did not correct deficiencies in the operation of the apprentice training program, are not binding on the Federal Courts, which may make their own independent examination and determination whether such alleged conditions existed during operation of the apprentice training program by United, Local 363, JAC, and whether the plaintiffs are legally responsible for and subject to individual disqualification for conditions which existed during operation of the apprentice training program by United, Local 363, JAC.

In *Stein* v. *New York*, 346 U.S. 156, 181 (1952) the Court said:

> "Of course, this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding."

In *Niemotko* v. *Maryland*, 340 U.S. 368, 271 (1950) the Court said:

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded."

In *Ker* v. *California*, 374 U.S. 23, 34 (1962) the Court said:

> "While this Court does not sit as in 'nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, of findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental—*i.e.*, constitutional—criteria established by this Court have been respected."

Even if United, Local 363, JAC, had failed to complete the training of apprentices, we submit that the individual petitioners were not chargeable with knowledge thereof, nor with ratification of deficiencies in the supervision of apprentice training by United, Local 363, JAC, particularly, in the light of the allegations of the complaint, the supporting affidavit, and the Statement under District Court Rule 9(g) (A34; A57; A70-71) that the petitioners did not authorize, ratify or participate in such deficiencies in the supervision of apprentice training by United, Local 363, JAC, and that they had no knowledge thereof.

3. *Denial of equal protection of the laws.*

The Labor Department based its administrative charges that the employers' association and Local 363 of the Teamsters Union violated apprentice training regulations upon charges against Local 363 which were physically made and given to the Labor Department by Local 3 of the Electricians Union (37).

For many years Local 3 and Local 363 were rivals for members among journeymen and apprentice electricians (37).

In sustaining such charges and deregistering the apprentice training agreement between the employers' association and Local 363, the Labor Department intentionally complied with resolutions submitted by Local 3 to and adopted by the convention of the New York State Federation of Labor in September, 1973, which resolutions, as reported in Local 3's magazine, read as follows:

> "Whereas these illegitimate and subterfuge programs are in duplication of and unfairly compete with long-established legitimate, bona fide apprentice training programs;
>
> Resolved that the New York State AFL-CIO condemn these illicit apprentice training

programs, and call upon the Industrial Commissioner of the State of New York to decertify these illegitimate and subterfuge apprentice training programs; and be it further

Resolved that the New York State AFL-CIO call upon Governor Rockefeller and the Legislature to pass legislation to outlaw and to discontinue the practice of certifying apprentice training programs which are a duplication of existing bona fide, indentured long-established apprentice training programs."

The respondent personally attended the 1973 convention of the New York State AFL-CIO. Local 3's magazine quoted him as pledging to carry out the above-quoted resolution.

The Apprentice Training Council panel that heard the charges against the employers' association and Local 363 consisted only of officials of AFL-CIO building trades unions and employers who had collective bargaining contracts with such unions.

Effective June 3, 1974, the defendant amended the regulations of the Labor Department by adopting Regulation 601.8, which disqualified for three years from registering apprentices all "employer participants" in a multi-employer apprentice training agreement.

Under Regulation 601.8 the Labor Department has disqualified each petitioner until June 3, 1969, counting such disqualification from June 3, 1976, when the Appellate Division of the New York Supreme Court judicially confirmed the Labor Department's administrative determination sustaining the disciplinary charges against the employers' association and Local 363, and deregistering their apprentice training agreement.

For many years Local 3 has exerted pressure on governmental agencies not to deal with electrical contractors who do not employ members of Local 3; not to award public work electrical contracts to them even when

they are the lowest bidders therefor, and to cancel such contracts after award thereof; and such pressure included, among other actions, preventing and hindering performance of contracts by contractors who do not employ members of Local 3 by physical violence at job sites, including assaults on employees of such contractors, threats of violence, damage to and destruction of electrical work being performed by employees of such contractors, strikes, picketing of and preventing delivery of supplies and materials to job sites at which such contractors work, taking pictures of employees at such job sites and following them around, and other actions.

Such pressure by Local 3 has been effective in causing governmental agencies to cancel contracts with contractors who do not employ members of Local 3; to order such contractors to stop work and to remove from the job sites on the ground that the presence of their employees at governmental job sites is causing strikes and work stoppages by members of Local 3 at other job sites of the same governmental agency; and such governmental actions led to several law suits, including a suit by the National Labor Relations Board against Local 3 in which a preliminary injunction was granted by the Judge Edward F. Neaher in the Eastern District of New York and affirmed by the Second Circuit Court of Appeals (See: NLRB v. Local 3, ——F.2d——, N.Y. Law Journal, October 14, 1976, p. 1); a suit by Wickham Contracting Co., Inc., against the Board of Education of the City of New York and Local 3 for an injunction and damages caused by the Board's order to Wickham on July 19, 1974:

"to stop work until such time as you furnish labor which will not cause a stoppage"

by members of Local 3 working at other job sites of the Board of Education (74 Civil 3248, Southern District of New York); a suit by Mansfield Contracting Corporation against the City of New York for an injunction and

damages because the City cancelled its $4.5 million of electrical contracts with Mansfield, on the pretense that Mansfield was not a responsible contractor, because it then employed electricians and apprentices who were members of Local 363, and the City pretended that Mansfield had a "sweetheart" contract with Local 363, and that Local 363 was a racketeer union whose president had been indicted for extortion, of which he was later acquitted (73 Civil 1094, Southern District of New York); a suit by Eugene Iovine, Inc., against the City of New York and Home Insurance Company because the City refused to approve Iovine as completing contractor, on behalf of Home Insurance Co., as surety, on a defaulted City contract, after the City told Home that it would not approve Iovine as completing contractor, because Iovine did not employ electricians and apprentices who were members of Local 3 (75 Civil 2774, Southern District of New York); and a suit by three contractors whose apprentice training agreements with their own employees the Labor Department refused to register on the ground that such employees were members of Local 363, although the employers had not been members of the employers' association which had an apprentice training agreement with Local 363 (*Huhn v. Ross*, 76 Civil 2155, Eastern District of New York).

In the *Huhn* case, supra, Chief Judge Jacob Mishler in the District Court made a decision which granted a preliminary injunction, and said:

> "Plaintiffs' complaint recites allegations of a conspiracy between the Industrial Commissioner and officials of Locals 3 and 25 to prevent those electrical contractors who do not maintain bargaining relations with Locals 3 or 25 from obtaining public contract awards. Plaintiffs do not allege an isolated instance, but claim that there is a deliberate scheme to deprive them and others similarly situated of job opportunities in the building industry. Such allegations of purposeful discrimination are sufficient to state a claim under the equal protection clause and Civil Rights Act" (citations).

By deliberate discriminatory actions against contractors who do not employ members of Local 3, since July 1, 1973, to the date of this petition, the Labor Department has registered only one agreement for training of apprentices in the New York City area made by a contractor who did not employ members of Local 3; and that agreement it registered after it was sued in Federal court for violation of 14th Amendment rights of that contractor to due process of law and equal protection of the laws by refusing to act for two years on its application for registration of its apprentice training agreement with its own employees.

Since 1973 to the date of this petition, the Labor Department has continuously registered apprentice training agreements submitted by employer associations which had collective bargaining contracts with Local 3, and the Labor Department has registered several thousand individual apprentices who are members of Local 3, with only one non Local 3 registration.

This is intentional and purposeful unconstitutional discrimination that denied to the petitioners the equal protection of the laws. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1885); *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 531 (1948); *American Federation of Labor v. American Sash & Door Co.*, 335 U.S. 538 (1948); *Truax v. Raich*, 239 U.S. 33, 39-41 (1915).

The Labor Department also intentionally discriminated against the petitioners by deregistering the apprentice training agreement between Teamsters' Local 363 and the employers' association to which petitioners belonged, for alleged violations of apprentice training regulations, without deregistering for similar violations of apprentice

training regulations different apprentice training agreements between Local 3 of the Electricians' Union and associations of electrical contractors who are competitors of the petitioners for governmental electrical work contracts, and who employ only members of Local 3.

Such selective prosecution of petitioners' employers' association and the labor union with which it had collective bargaining contracts, without similarly prosecuting the employers' association of petitioners' competitors which had collective bargaining contracts with Local 3 of the Electricians' Union, the rival of Local 363 of the Teamsters' Union, constituted application and enforcement of apprentice training regulations "with an evil eye and an unequal hand", which denied to the petitioners the equal protection of the laws. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1885).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

August 5, 1977

Respectfully submitted,

MORRIS WEISSBERG
Attorney for Petitioners

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPERT ELECTRIC, INC., HENDRIX ELECTRIC, INC., ARGANO ELECTRIC CORP., ZIP ELECTRIC CO., INC., EUGENE IOVINE, INC., PHASE II ELECTRIC CORP., TAP ELECTRICAL SERVICES AND CONTRACTING, INC., RAYMOR ELECTRIC CORP., RUSSELL H. VENSK, INC., BISANTZ ELECTRIC CO., INC., ROBERT E. BURDEN ELECTRICAL CONTRACTOR, INC., and FIVE STAR ELECTRIC CORP.,

Plaintiffs,

-against-

LOUIS L. LEVINE, individually and as Industrial Commissioner of the State of New York,

Defendant.

APPEARANCES:

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CARTER, District Judge

OPINION

Plaintiffs, members of the United Construction Contractors Association, Inc. ("United"), by order to show cause, have moved to enjoin defendant Industrial Commissioner of New York from cancelling the registration of apprentice electricians employed by plaintiffs and from disqualifying each plaintiff from employing registered apprentice electricians for a three-year period. A hearing was held on May 30, 1975, at which time the plaintiffs were afforded the opportunity to present evidentiary proof of their factual contentions but declined to do so preferring to stand on their position that their constitutional rights had been violated *per se* by plaintiffs being disqualified from participation in the state apprentice program without being found personally to have violated the requirements of the state Department of Labor. Defendant has moved pursuant to Rule 12 (b)(1) and (6), F.R.Civ.P., to dismiss the action.

Background Facts

Plaintiffs are electrical contractors and members of United, a New York membership corporation which conducts collective bargaining negotiations and enters into collective bargaining agreements on behalf of its members with Local 363, International Brotherhood of Teamsters ("Local 363"). The local is comprised of journeymen and apprentice electricians.

United and Local 363 formed the Joint Apprenticeship Committee ("JAC") to sponsor an apprenticeship training program, *see* Article 23 (Apprenticeship Training) of New York's Labor Law, and filed a Master Agreement, pursuant to §§811(1) (d) and 220(3) (e) of the Labor Law[1], with the State Department of Labor on or about December 1, 1971. Unter the terms of the Master Agreement and Labor Law §§811, 812 and 815 (McKinney's 1965), the registered apprentices were to receive on-the-job training in the processes of the electrician's trade according to a schedule of work processes contained in the Master Agreement. The apprentices were also to receive 144 hours of related and supplemental classroom instruction. Master Agreement, Appendix B; Labor Law, §815 (3).

On June 17, 1974, defendant industrial commissioner, pursuant to 12 N.Y.C.R.R. 601.7, served a notice of proposed deregistration of the apprenticeship agreement and program upon JAC, Local 363, and United. The notice set forth certain allegations by the Department of Labor, summarized by the Commissioner as follows:

1. §811(1)(d) empowers the Industrial Commissioner "to register approved apprenticeship agreements, and upon performance thereof, to issue certificates of completion of apprenticeship." Labor Law, §811 (1)(d) (McKinney's 1965). §220(3)(e) provides that "[a]pprentices will be permitted to work as such only when they are registered, individually, under a bona fide program registered with the New York State Department of Labor." Labor Law, §220(3)(e) (McKinney's Supp. 1974).

1. The Joint Apprenticeship Committee sponsor allegedly failed to complete the training of apprentices as provided under the standards contained in Article 23 of the Labor Law and under the terms and conditions of the Master Agreement entered into by the Joint Apprenticeship Committee.
2. Some of the employers who were participants in the J.A.C. allegedly failed to pay prevailing wages or used apprentices in excess of the proper ratio for electricians in the locality.
3. That long after the violations and shortcomings of the program were originally made known to the sponsor in June of 1973, the sponsor allegedly failed to correct the violations and to comply with the rules and regulations in their own Master Agreement. These allegations resulted from a survey initiated by the Department in March of 1974, which purported to show that the apprentices were not receiving proper related instruction and that the participating employers were still using excessive apprentices.
Order and Determination of the Industrial Commissioner, at 1-2.

Upon request of JAC, United and Local 363, five hearings were thereafter held, and the three respondents were all represented by separate counsel at these hearings. The recommendations of the hearing panel were reviewed and subsequently sustained by the Commissioner, who found:

1. From the inception of the program in 1961 until 1973, not one of the 574 apprentices achieved completion of the program or certifiable journeyman status.
2. The sponsor not only failed to meet its obligations to provide related classroom in-

struction but by its own actions made it impossible for any apprentice to obtain the necessary 144 hours of related classroom instruction.
3. The sponsor in a Joint Apprenticeship Committee consists of the union and each contractor having a collective bargaining agreement with said union. Therefore the act of each participating contractor in an apprenticeship program is attributable to the sponsor.
4. The sponsor failed to take any substantial corrective action with respect to violations of the Labor Law despite the fact that such violations were matters of public record.
5. The record indicates that the sponsor, after agreeing to correct deficiencies in the program, failed to do so. *Id.* at 7.

Following the provisions of 12 NYCRR 601.7 (c) (4), 601.8,[2] the Commissioner cancelled the registration of apprentice electricians employed by plaintiffs, and, for a period not to exceed three years, disqualified them from both employing registered apprentices and from registering

2. 12 NYCRR 601.7 (c)(4) states:
"(c) *Procedure for formal deregistration*
"(4) In each case in which deregistration is ordered, the commissioner shall publish promptly in newspapers of general circulation a notice of the order and shall notify the registrant. In addition, the commissioner shall promptly notify all registered apprentices of the deregistration of the program; the effective date thereof; that such cancellation automatically deprives the apprentice of his individual registration; and that the deregistration removes the apprentice from coverage for State purposes."
12 NYCRR 601.8 provides:
"Restatement of program registration. Anyapprenticeship program formally deregistered pursuant to this Part may not be reinstated for a period not to exceed three years, nor shall the sponsor or any employer or union participant be eligible to register any apprenticeship training program under any other name for such period."

any apprenticeship agreement or training program in their individual names as employers.

Contentions of the Parties

Plaintiffs base their motion for a preliminary injunction on three grounds: (1) that they were denied due process of law mandated by the Fourteenth Amendment, because they have been held responsible for acts of JAC, United and Local 363 which they did not authorize, ratify or participate in; (2) that they were denied due process of law because they were not provided with notice and an opportunity to be heard, as individual employers, on the proposed deregistration, and (3) that they were denied equal protection of the laws as guaranteed by the Fourteenth Amendment, because plaintiffs' program has been deregistered while no similar action has been taken against their competitors' program which allegedly produced complaints of Article 23 violations. Because they now have to pay all workers full wages instead of lower apprentice wages, plaintiffs claim irreparable harm resulting from their inability to bid competitively for public contracts.

Defendant seeks dismissal of the complaint on the grounds that the court lacks subject-matter, jurisdiction over the action and that the complaint fails to state a claim upon which relief can be granted.

Discussion

Plaintiffs' initial contention is that they cannot be held legally responsible for acts by JAC, United, Local 363, or by any employers other than plaintiffs which violated the Master Agreement or the standards of Article 23.

JAC, the program's sponsor, was formed pursuant to the agreement by Local 363 and United. The latter, of which all plaintiffs are members, represents the employers

in negotiations and agreements with the union; when United added its signature to the Master Agreement it did so on behalf of its members. This was the only agreement on the table; the Commissioner, in registering the program, entered into a contract with United and JAC, not with plaintiffs individually. Plaintiffs enjoyed the benefits of the program through their membership in the signatories; they therefore cannot complain when the Commissioner terminates these benefits when he finds the signatories to be in violation of the terms and spirit of the Master Agreement and Article 23.

Moreover, Labor Law §817 states:

> "The provisions of this article (Article 23) shall apply to a person, firm, corporation or craft only after such person, firm, corporation or craft has voluntarily elected to conform with its provisions."

The regulations enacted purusant to Article 23 clearly indicate that the sponsor of the training program, including the joint apprenticeship committee, acts as agent for participating employers. See 12 NYCRR 601.3(b), (c) and (e). The Master Agreement commits participating employers or the apprenticeship committee acting as agent for the employers to evaluate periodically the apprentice's progress, both in job performance and related instruction, and to maintain appropriate records. This obligation is a prerequisite for the registration of the program. See 12 NYCRR 601.5(c) (6). The Master Agreement requires 144 hours of related instruction for each apprentice; this too, is a condition of registration. See Labor Law, §812; 12 NYCRR 601.5 (c) (4).

Plaintiffs have not alleged that they unwittingly became participating employers, or were forced to employ apprenticeship labor at lower wages. In fact, the regulations explicitly provide that no apprenticeship program or agreement shall be eligible for registration

unless the Commissioner finds that " . . . in the case of a Joint Apprenticeship Committee the participating employers have agreed to register all of the apprentices in their employ." 12 NYCRR 601.4 (a) (4). By voluntarily participating plaintiffs agreed to the terms and regulations of Article 23, including 12 NYCRR 601.8; *supra* n.2. Plaintiffs cannot have it both ways. It is fundamentally disingenuous for these plaintiffs, who have reaped the benefits of the apprenticeship program, now to argue that they are free from the statutory and regulatory commitments and restrictions which the Master Agreement bound the participants to observe and from the consequences of failing to do so.

Plaintiffs argue, nonetheless, that mere membership in an association does not create liability in the members for the acts of the association. In *Phelps Dodge Refining Corp. v. FTC*, 139 F. 2d 393, 396-97 (2d Cir. 1943), a seminal case concerning the liability of members for acts of their association, the court stated:

> "Thus the issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Granted that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to dissociate himself from them is a ratification of what they are doing. He becomes one of the principals in the enterprise and cannot disclaim joint responsibility for the illegal uses to which the association is put."

The Second Circuit found in *Phelps Dodge* that the receipt by a member of certain price and dealer lists mailed by its

trade association was enough from which to infer that the member learned of the association's illegal activities, or "at least it should put a member of a trade association upon inquiry and charge him with knowledge of what an inquiry would have disclosed as to his association's activities." *Id.* at 396.

Every participating employer in a Joint Apprenticeship Committee forms an integral part of the sponsor and is responsible for seeing that its apprentices are trained in accordance with the provisions of the Master Agreement. It is simply incredible for plaintiffs to contend that they were unaware of the massive violations which the hearing panel found and the Commission endorsed. The fact that not one of the 574 apprentices achieved completion of the training program during a span of a dozen years, and that not one completed 144 hours of required related instruction, should have put each participating employer upon inquiry notice that the sponsor and partrticipating employers were not fulfilling their obligations under the program. Plaintiffs' failure to dissociate themselves from the sponsor is thus a ratification of the condemned activities. 139 F. 2d at 396. Plaintiffs' first due process contention is devoid of merit.

Plaintiffs' second due process assertion—that they were denied procedural due process since the notice of proposed deregistration did not name plaintiffs individually—requires no extended reply. In order to pass constitutional muster, the

> "elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "Due Process," however, "is not a rigid and inflexible formula, but is an elusive concept which varies according to the factual context." *Hudson Tire Mart, Inc.* v. *Aetna Casualty and Surety Co.*, No. 75-7067, at 4453 (2d Cir. June 27, 1975).

As noted earlier, insofar as the apprenticeship program was concerned, both United and JAC represented the interests of participating employers. *Cf. United States* v. *Local 638, Enterprise Association of Steam*, 360 F. Supp. 979, 995 (S.D.N.Y. 1973), *modified on other grounds*, 501 F. 2d 622 (2d Cir. 1974). The notice of proposed deregistration was served on both United and JAC; additionally all plaintiffs received copies of that notice on the same day. A hearing was requested, notice of the hearing was sent to United and JAC, and both entities were represented there by counsel; in fact, the same counsel represent plaintiffs in this action. One of the plaintiffs in this action, Eugene Iovine, Inc., appeared and testified at one of the hearings. Plaintiffs, then, as members of United and as participating employers in the JAC, received actual and constructive notice of the proposed deregistration, and were not denied any opportunity to be heard.

Plaintiffs' final point—that they suffered an invidious discrimination in violation of the Equal Protection Clause—similarly deserves short shrift. The complaint alleges that at the hearings on the deregistration, the Department of Labor produced records of over 200 violations of apprenticeship agreements and regulations by competing contractor associations and rival labor unions. Plaintiffs claim that the Commissioner's failure to invoke corrective procedures against these groups constitutes an equal protection violation. Yet, when given the opportunity to support this claim with some modicum of proof, plaintiffs refused. The court, confronted with bare

allegations which neither set out the nature of the purported violations, nor the specification of inaction by the Commissioner, is thus constrained to conclude that there is no substance to the equal protection claim.

Further, since no "suspect" classification or fundamental interest is here involved, the alleged selective application of deregistration by the Commissioner must be tested under the less rigorous "traditional" equal protection analysis; that is, it must be sustained unless it is "patently arbitrary" and bears no rational relationship to a legitimate government interest. *Frontiero* v. *Richardson*, 411 U.S. 677, 683 (1973).

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by it are imperfect." *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961). "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge, supra*, 397 U.S. at 486-87. Neither the complaint nor plaintiffs' accompanying affidavits set forth the nature of the alleged violations of the rival associations and locals. For all this court knows, those alleged violations may concern an aspect of apprenticeship programs entirely different from the regulatory problem which caused the Commissioner to deregister the program in the instant case. The state's legitimate interest in "insur[ing] that apprenticeship training programs (which are) developed and registered . . . are of the highest possible quality in all respects of on-the-job training and related instruction and that all apprentice training programs provide meaningful employment and relevant training for all apprentices," 12 NYCRR 601.1, more than justifies the deregistration decision here. Plaintiffs have asserted no

facts which even suggest an inference of arbitrary discrimination, *see McGowan, supra,* 366 U.S. at 426; this third contention also rests on pillars of air.

The law in this Circuit is that a preliminary injunction will issue upon "the demonstration of probable success on the merits and irreparable harm if the relief is not granted," *414 Theater Corp.* v. *Murphy,* 499 F. 2d 1155, 1159 (2d Cir. 1974), or plaintiff must raise sufficiently; serious questions going to the merits to make them a fair ground for litigation and establish that the balance of hardship tips decidedly in his favor. *Gulf & Western* v. *Great Atlantic & Pacific Tea Co.*, 476 F. 2d 687 (2d Cir. 1973). Plaintiffs have met neither yardstick. Accordingly, the motion for preliminary injunction must be denied.

Turning to defendant's Rule 12(b) (1) motion to dismiss for lack of subject matter jurisdiction, plaintiffs, as the parties asserting jurisdiction, have the burden of proving all jurisdictional facts, *Trinanes* v. *Schulte,* 311 F. Supp. 812, 813 (S.D.N.Y. 1970). Since jurisdiction over the action is invoked under 28 U.S.C. §1331—federal question jurisdiction—plaintiffs must show that the alleged federal claims are substantial, *i.e.*, not obviously frivolous. *Hagans* v. *Lavine,* 415 U.S. 528, 536-37 (1974). "The requirement of substantiality does not refer to the value of the interests that are at stake but to whether there is any legal substance to the position the plaintiff is presenting." Wright-Miller-Cooper, *Federal Practice and Procedure:* Jurisdiction §3564, at 426 (1975).

At the hearing on the preliminary injunction, plaintiffs were presented with the opportunity to offer evidentiary proof buttressing the three contentions. They chose not to do so, instead deciding to rest their case on the constitutional assertions raised in the complaint. It is plain from the complaint that plaintiffs have been denied neither due process nor equal protection of the laws, and accordingly, their claims are devoid of merit. Defendant's motion to dismiss is granted.

SO ORDERED.

Dated: New York, New York July 24, 1975

ROBERT L. CARTER
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPERT ELECTRIC, INC., HENDRIX ELECTRIC, INC., ARGANO ELECTRIC CORP., ZIP ELECTRIC CO., INC., EUGENE IOVINE, INC., PHASE II ELECTRIC CORP., TAP ELECTRICAL SERVICES AND CONTRACTING, INC., RAYMOR ELECTRIC CORP., RUSSELL H. VENSK, INC., BISANTZ ELECTRIC CO., INC., ROBERT E. BURDEN ELECTRICAL CONTRACTOR, INC., and FIVE STAR ELECTRIC CORP.,

Plaintiffs,

-against-

LOUIS L. LEVINE, individually and as Industrial Commissioner of the State of New York,

Defendant.

APPEARANCES:

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Attorneys for Plaintiffs

Hon. Louis J. Lefkowitz
Attorney General of the
State of New York

CARTER, District Judge

OPINION

Plaintiffs, members of the United Construction Contractors Association, Inc. ("United") and the Joint Apprenticeship Committee ("JAC"), have moved pursuant to Rule 60(b), F.R. Civ. P., to vacate the judgment of July 24, 1975 entered in this court. A rehearing of plaintiffs' motion for a preliminary injunction is also requested.

Defendant has moved to dismiss the complaint pursuant to Rule 12(b), F.R. Civ. P., or in the alternative for summary judgment pursuant to Rule 56, F.R. Civ. P.

Background

A hearing was held on March 3, 1976, at which this court stayed the proceeding pending determination by New York state courts of a proceeding captioned, *In the Matter of United Construction Contractors Association, Inc., et al.* v. *Louis L. Levine, as Industrial Commissioner*, 52 App. Div. 2d 371 (3d Dept. 1976). After having the Article 78 proceeding transferred to the New York State Supreme Court, Appellate Division, Third Judicial Department by the State Supreme Court, Special Term, the determination of the Industrial Commissioner of the State of New York to deregister the joint apprenticeship training program between United and Local 363, International Brotherhood of Teamsters ("Local 363") was confirmed.

Contention of the Parties

Plaintiffs based their original motion for a preliminary injunction on three grounds: (1) that they were denied due process of law because they were not provided with notice and an opportunity to be heard, as individual employers,

on the proposed deregistration, (2) that they were denied equal protection of the law as guaranteed by the Fourteenth Amendment, because plaintiffs' program has been deregistered while no similar action has been taken against their competitors' program which allegedly produced complaints of Article 23 violations, and (3) that they were denied due process of law mandated by the Fourteenth Amendment, because they have been held responsible for acts of JAC, United and Local 363 which they did not authorize, ratify or participate in.

Defendant seeks dismissal of the complaint on the grounds that this court lacks jurisdiction over the subject matter of the complaint, that plaintiffs fail to state a claim upon which relief can be granted, and that the decision of the New York State Supreme Court, Appellate Division, Third Judicial Department, *In the Matter of United Construction Contractors Association, Inc., et al.* v. *Louis L. Levine, as Industrial Commissioner, supra,* is *res judicata.*

Discussion

For the reasons that follow, defendant's motion to dismiss is granted.

With respect to plaintiff's first claim, it is apparent that notice of the proposed deregistration was served on both United and JAC, the named parties in the deregistration hearing. Insofar as both United and JAC represented the interests of participating employers in the apprenticeship program, it is apparent that they were acting on behalf of the plaintiffs' interests at the deregistration hjarings. Therefore, notice to United and JAC was sufficient and the individual members of these organizations were not entitled to notice. *See Rosenfeld* v. *Black,* 336 F. Supp. 84, 92 (E.D.N.Y. 1972). Moreover, the individual employers did in fact receive actual notice since they were sent copies of the notice given to United and

JAC. Accordingly, the contention that plaintiffs' due process rights were violated is without merit. *See Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950); *Hudson Tire Mart, Inc.* v. *Aetna Casualty and Surety Co.,* 518 F. 2d 671, 673 (2d Cir. 1975). The decision *In the Matter of United Construction Contractors Association, Inc., et al.* v. *Louis L. Levine, as Industrial Commissioner, supra,* is *res judicata* as to plaintiffs' second and third contentions.

Before a prior decision can be held to be *res judicata* in a subsequent suit, it must be determined that the second suit is between the same parties and based upon the same causes of action. *McNellis* v. *First Federal Savings and Loan Association of Rochester, New York,* 364 F. 2d 251, 254 (2d Cir.), *cert. denied,* 385 U.S. 970 (1966). *See also, Raitport* v. *Commercial Bank Located Within This District As A Class,* 391 F. Supp. 584, 586 (S.D.N.Y. 1975); and *United States* v. *General Electric Company,* 358 F. Supp. 731, 738 (S.D.N.Y. 1973). It is clear that in the suit before this court there is both substantial identity of parties and the same causes of action as existed in the state court. Certainly, there is an identity of parties in that the defendant is the same and the plaintiffs' interests are the same as existed in the state court suit. As noted earlier, both United and JAC represented the interests of plaintiffs in the deregistration hearing and the subsequent Article 78 proceeding in the state courts. As long as plaintiffs' interests were represented at the above proceeding by one having authority to represent him, they are bound by the judgment, although they were not formally a party to the litigation. *Kersh Lake District* v. *Johnson,* 309 U.S. 485 (1940); *Chicago, Rock Island & Pacific Railway Company* v. *Schendel,* 270 U.S. 611 (1926); *Ma Chuck Moon* v. *Dulles,* 237 F. 2d 241, 243 (9th Cir. 1956) *cert. denied,* 352 U.S. 1002 (1957); *Bruszewski* v. *United States,* 181 F. 2d 419, 423 (3rd Cir.) (concurring opinion), *cert. denied,* 340 U.S. 865 (1950); and *Battle* v. *Cherry,* 339 F. Supp. 186,

192 (N.D. Ga. 1972). Moreover, plaintiffs' claim that they were denied due process because they have been held responsible for acts of JAC, United and Local 363 which they did not authorize, ratify or participate in, was alleged in the 12th paragraph of the state court petition, and rejected by the court when it stated that "|t|he administrative determination to adopt regulation section 601.7(c) has reasonable basis in law and must be sustained . . ." *In the Matter of United Construction, Inc., et al.* v. *Louis L. Levine, as Industrial Commissioner, supra* at 374. Also, plaintiffs' claim, that they were denied equal protection because plaintiffs' program has been deregistered while no similar action has been taken against their competitors' program, was alleged in the 29th paragraph of the state court petition and rejected when the court stated that: "|t|he record does not sustain the petitioners' claim that respondent discriminated against petitioners in the cancellation of their agreement." *Id.* at 375. I am compelled, therefore, to hold that the causes of action alleged here are the same as presented and adjudicated in state court. *Herendeen* v. *Champion Intern. Corp.*, 525 F. 2d 130, 133 (2d Cir. 1975). Accordingly, the matter is *res judicata* and defendant's motion to dismiss is granted.

IT IS SO ORDERED.

Dated: New York, New York November 5, 1976

ROBERT L. CARTER
U.S.D.J.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 794, 964
September Term 1976
Argued: February 24, 1977
Decided: May 12, 1977
Docket Nos. 75-7462, 76-7560

EXPERT ELECTRIC, INC., HENDRIX ELECTRIC, INC., ARGANO ELECTRIC CORP., ZIP ELECTRIC CO., INC., EUGENE IOVINE, INC., PHASE II ELECTRIC CORP., TAP ELECTRICAL SERVICES AND CONTRACTING, INC., RAYMOR ELECTRIC CORP., RUSSELL H. VENSK, INC., DISANTZ ELECTRIC CO., INC., ROBERT E. BURDEN ELECTRICAL CONTRACTOR, INC., and FIVE STAR ELECTRIC CORP.,

Plaintiff-Appellants,

-against-

LOUIS L. LEVINE, individually and as Industrial Commissioner of the State of New York,

Defendant-Appellee.

Before MANSFIELD, VAN GRAFFEILAND, *Circuit Judges*, and MISHLER, *District Judge.**

Consolidated appeal from two judgments entered by

*Of the United States District Court for the Eastern District of New York, sitting by designation.

the District Court for the Southern District of New York, Robert L. Carter, *District Judge*, dismissing plaintiffs-appellants complaint on res judicata grounds.

Affirmed. N. GEORGE TURCHIN, Esq., New York, N.Y.; MORRIS WEISSBERG, Esq., New York, N.Y., for *Appellants.*

DOMINICK J. TUMINARO, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, New York, N.Y., of counsel), for *Appellee.*

This is a consolidated appeal from two orders enteredby the District Court for the Southern District of New York, Robert L. Carter, District Judge, the first dated July 24, 1975, *see Expert Electric, Inc., et al. v. Levine*, 399 F. Supp. 893 (S.D.N.Y. 1975), and the second, November 5, 1976, both dismissing appellants' complaint. Appellants, by order to show cause, commenced an action seeking to enjoin the Industrial Commissioner from deregistering their master apprenticeship training program, and from disqualifying all participants from registering new programs in their individual capacities for three years.

Appellants are electrical contracting firms and members of United Construction Contractors Association, Inc. ("United"), a New York membership corporation established to jointly represent its employer participants in all phases of labor negotiations with Local 363, International Brotherhood of Teamsters ("Local 363"). On October 19, 1971, United and Local 363 executed a master agreement which outlined a program for the training of apprentice electricians. The contract called for a five year apprenticeship term during which apprentices were to receive on-the-job training in a schedule of trade processes and 144 hours per year of related classroom instruction. The agreement also recited minimum wage scales and prescribed maximum journeyman/apprentice ratios. A Joint Apprenticeship Committee ("JAC"), comprised of United and Local 363 officials, was formed to sponsor the

program and administer its terms. On December 1, 1971, the master agreement was filed with, and registered by, the Apprentice Training Section of the New York State Department of Labor pursuant to sections 220 (3) (c) and 811 (1) (d) of the Labor Law.

In 1973, a complaint was filed[1] with the Labor Department charging the JAC and various employer participants with violating the terms of the master apprenticeship training agreement and applicable state regulations. Labor Department officials met informally with JAC representatives in June of that year to discuss the recited deficiencies in recruiting methods and the supplementary in-class educational program. However, when no remedial steps were taken by sponsoring officials, a formal investigation was commenced. On June 17, 1974, the Industrial Commissioner issued a notice of proposed deregistration and caused it to be served on the named parties, *i.e.*, United, Local 363 and the JAC, see 12 N.Y.C.R.R. §§601.7 (b) and (c).[2]

The state charged that the JAC, even after notification of the program's shortcomings, failed to take any corrective action, thus rendering it impossible for any apprentice to successfully complete all phases of training. In addition, several employer participants, only one of whom is an appellant herein,[3] were cited for employing unregistered apprentices, utilizing trainees in numbers exceeding the prescribed journeyman/apprentice ratio, or failing to pay prevailing wage rates and supplements. A copy of the deregistration notice was served on all participating employers, whether or not they were charged with a particular violation.

At the request of United, Local 363, and sponsor JAC, see 12 N.Y.C.R.R. §601.7 (c) (2), hearings were conducted on the alleged violations by the Apprenticeship and Training Council, a panel of building contractors and union officials, see N.Y.C.R.R. §601.9. On May 1, 1975,

the Industrial Commissioner issued his opinion adopting the recommendations of the hearing panel and finding that:

> (1) since the inception of the program in 1961, not one of the 574 apprentices registered, successfully achieved certifiable journeyman status; that
> (2) the sponsor, JAC, failed to assure that the required in-class instruction was provided rendering it impossible for any apprentice to complete the supplemental educational phase that
> (3) the sponsor, since partially composed of employer representatives, was responsible for the wrongful acts of participating contractors; and that
> (4) the sponsor, despite having knowledge of program's deficiencies, and agreeing to take corrective action, failed to follow a remedial course.

In conjunction, appellee entered an order directing " . . . that the Apprenticeship Training Program of the United Construction Contractors Association, Inc. and Local #363 International Brotherhood of Teamsters, Joint Apprenticeship Committee is hereby deregistered, effective immediately." The order contained no express reference to the operability of 12 N.Y.C.R.R. §601.8 which in essence contemplates that employer participants in a deregistered program be disqualified from registering new programs in their individual capacities for a period not to exceed three years.[4]

On May 22, 1975, appellants filed a three-count complaint in the District Court for the Southern District of New York seeking to enjoin the program's deregistration and their disqualification from reinstatement. Firstly, the contractors attacked the facial validity of regulation

sections 601.7 (c) and 601.8, 12 N.Y.C.R.R. §§601.7(c) and 601.8, promulgated by the Industrial Commissioner. Appellants argued they could not, consistent with the due process clause, be summarily subjected to deregistration and automatic disqualification from re-registering new programs solely because of the misdeeds of others. Their inability to employ apprentices in the absence of a registered training program, appellants argued, foreclosed all opportunity to successfully bid on federal, state, and local contracts. The demands of due process, the litigants claimed, required proof that they knew of, participated in or ratified the wrongful acts before they could be deprived of a valuable property right. Secondly, appellants alleged that the state's failure to prosecute its competitor, Local 3, International Brotherhood of Teamsters, for similar violations constituted a denial of equal protection. In the last count, premised under 42 U.S.C. §1983, appellants sought damages for the alleged loss of bidding opportunities.

While this federal court action was pending, United brought an Article 78 proceeding in the New York State Supreme Court, Appellate Division, challenging the sufficiency of the Industrial Commissioner's findings. Petitioner argued that there was no evidentiary basis to support appellee's order. Moreover, United claimed, since the promulgation of the deregistration provision, 12 N.Y.C.R.R. §601.7 (c), was without statutory authority, the Industrial Commissioner's implementation of the regulatory scheme and consequent order of deregistration served to deprive petitioner of its right to due process of law. United also asserted an equal protection claim arguing that the Industrial Commissioner's decision not to proceed against Local 3 was constitutionally unsound.

Judge Carter acted first. In a memorandum of decision and order entered on July 24, 1975, the court rejected appellants' principal due process claim. The court held that appellants, having enjoyed the benefits of the

program through their membership in the signatory associations, could not be heard to object when the state terminated these benefits because of successive violations by the signatories. These contractors were voluntary, not unwitting, participants in the program. When the JAC, as agent for the employer participants, signed the agreement and pledged to adequately train new apprentices, the court held, all participants were bound by the statutory and regulatory proscriptions that circumscribed the training scheme. Appellants' equal protection claim was found to be without merit. No evidence was offered to support the firms' contention that others guilty of similar violations were not subjected to deregistration proceedings.

After filing a notice of appeal, appellants sought leave from this court to apply to Judge Carter for an order vacating his judgment and granting a rehearing on their motion for a preliminary injunction. The requested relief was afforded by both courts. After entertaining oral argument, the district court issued a stay pending determination of the matter before the Appellate Division.

On June 3, 1976, the Appellate Division rendered its decision affirming the Industrial Commissioner's order of deregistration. *In the Matter of United Construction Contractors Association, Inc., et al* v. *Louis Levine*, 52 App. Div. 2d 371 (3d Dep't 1976). The court noted that Article 23 of the Labor Law, Labor Law §§811 *et seq.* (McKinney's 1965), vested the Industrial Commissioner with broad authority in the supervision of apprenticeship programs. Effective administration of apprenticeship training, the court reasoned, demanded that the state be empowered to deregister any program which was operated in violation of established rules and regulations. The mere fact that no specific statute authorized the promulgation of a deregistration scheme was of little import. The plan embodied in 12 N.Y.C.R.R. §601.7(c) which envisioned notice, an opportunity to be heard, a decision, and supporting reasons, the court concluded, had a reasonable

basis in law and satisfied the requirements of the due process clause.

The evidence, the court pointed out, indicated that not one of the more than 570 registered apprentices successfully completed all phases of training since the inception of the program. The court found that such evidence provided a sound basis for appellee to conclude that the sponsor failed in its supervisory obligations. United could not disassociate itself from the wrongful conduct of the employer participants; it was the JAC's duty to ensure the accomplishment of the program's aim and objectives. Deregistration, the court declared, was not an overly harsh penalty when the sponsor failed so grossly at its task. United's equal protection claim was succinctly rejected as without evidentiary foundation. Leave to appeal to the Court of Appeals was denied.

Thereafter, appellee Levine sought to renew his motion in the district court for dismissal on the pleadings, and in the alternative, for summary judgment, on the ground that the Appellate Division's determination was res judicata. On November 5, 1976, the district court issued a memorandum of decision and order dismissing the complaint. It was the court's position that insofar as United and the JAC were acting on behalf of appellants' interests, the requirements of the due process clause were satisfied when the associations were served with notice and subsequently appeared at the hearings. Appellants' substantive due process and equal protection claims were rejected on res judicata grounds. The contractors appeal from this, as well as the court's earlier ruling of July 24, 1975.

Spurred by considerations of judicial economy, and a public policy that favored injecting certainty into the legal system, the doctrine of res judicata, judicial in origin, was established for the primary purpose of avoiding repetitive litigation of the same causes of action. *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 597, 68 S.Ct.

715, 719 (1933). Briefly stated, the parties to an action in which a judgment on the merits has been rendered, or their privies, are barred from relitigating the same cause of action in a second proceeding. *Cromwell* v. *County of Sac*, 94 U.S. 351, 352 (1876); *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 319, 47 S.Ct. 600, 602 (1927); *McNellis* v. *First Federal Savings and Loan ASsociation of Rochester, New York*, 364 F. 2d 251, 254 (2d Cir), *cert. denied*, 385 U.S. 970, 87 S.Ct. 504 (1966); *Saylor* v. *Lindsey*, 391 F. 2d 965, 968 (2d Cir. 1968). There must be both an identity of parties and an identity of issues between the prior and subsequent suits before operation of the res judicata doctrine is triggered. Where a subsequent suit is based on a different cause of action, the principle of collateral estoppel renders the prior judgment conclusive only as to matters necessarily litigated and determined in the prior proceeding. *Southern Pacific Railroad Co.* v. *United States*, 168 U.S. 1, 48-49, 18 S.Ct. 18, 27 (1897); *Commissioner of Internal Revenue* v. *Sunnen, supra*, at 597-98, 68 S.Ct. at 719; *McNellis* v. *First Federal Savings and Loan Association of Rochester, New York, supra*, at 254.

The threshold requirement of identity of parties, qualified by the doctrine of privity, finds its roots in the ancient notion, now supplemented by the due process clause, that a person cannot be bound by a judgment without notice of a claim and an opportunity to be heard. Whether such identity is evident is a factual determination of substance, not mere form. *Astron Industrial Associates, Inc.* v. *Chrysler Motor Corp.*, 405 F. 2d 958, 961 (5th Cir. 1968); *Aerojet General Corp. v. Askew*, 511 F. 2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908, 96 S.Ct. 210 (1975). Generally speaking, one whose interests were adequately represented by another vested with the authority of representation is bound by the judgment, although not formally a party to the litigation. *Aerojet General Corp.* v. *Askew, supra* at 719; *Roode* v. *Michaelian*, 373 F. Supp. 53, 55 (S.D.N.Y. 1974). While often justified by the

doctrine of privity, the theory underlying this general proposition is that the party bound is in substance the one whose interests were at stake in the prior litigation. Therefore, we need first examine, in order to determine whether there was an identity of parties between the state and federal court actions, the degree of representative authority vested in the sponsor JAC to administer the terms of the program.

Unfortunately, the brief one page form master agreement provides a skimpy basis from which to discern the extent of responsibility vested in the Committee. However, an inspection of the regulatory scheme, 12 N.Y.C.R.R. §§601.1 *et seq.*, expressly confirms that the sponsor, JAC, is fully accountable for the conduct of the program. The sponsor is recognized as the single representative of all participants, *see* 12 N.Y.C.R.R. §601.3(e). As such, it is obligated to perform all administrative functions, *see* 12 N.Y.C.R.R. §§601.5(b)(6), (11), (12), (14), (15), (16) and (19), to assure the participants' compliance with all occupational health and safety standards, *see* 12 N.Y.C.R.R. §601.5(b)(8), and foremost, to guarantee " . . . that the program will be conducted, operated, and administered in conformity with all applicable provisions." 12 N.Y.C.R.R. §601.5(b)(18). In short, it is apparent from the face of the regulations themselves that the JAC is the employer participants' conduit to the overseeing agency, and the body vested with representative authority over the training program's operation. *See Kersh Lake Drainage District* v. *Johnson*, 309 U.S. 485, 491, 60 S.Ct. 640, 644 (1940).

Whether in their representative capacities the Committee and trade associations can be said to have had foremost in mind the interests of participating contractors during their appearance before the hearing panel and the Appellate Division remains to be determined. United, as a multi-employer unit, was presumably formed with an eye towards securing a more advantageous position for each

partipating contractor during labor negotiations and contract administration. Not only was increased bargaining power brought to the table, but the threat of favoritism and the concomitant competitive advantage one employer may gather was undercut, *see gen. A. Cox and D. Bok, Labor Law* at 335 (7th ed. 1969); *Publishers Association of New York City* v. *National Labor Relations Board*, 364 F. 2d 293 (2d Cir. 1966). Similarly, the Joint Apprenticeship Committee was formed to rid the individual participants of the administrative burdens that accompany the training program while garnering for each participant the cost advantage of apprentice labor. Insofar as the association had any interests in avoiding deregistration, they were the collective interests of the individual participants. Moreover, this is not a case where either the associations or any of the individual contractors were subject to potential criminal liability, *see e.g. United States* v. *Sherpix, Inc.*, 512 F. 2d 1361 (D.C. Cir. 1975). The only interests United and the JAC had to protect through the administrative and judicial process were those of the participating contractors. We conclude, therefore, that there is identity of parties. *Chicago R. I & P Railway Co.* v. *Schendel*, 270 U.S. 611, 618, 46 S.Ct. 420, 423 (1927); *Kersh Lake Drainage District* v. *Johnson, supra* at 491, 60 S.Ct. at 644; *Aluminum Company of America* v. *Admiral Merchants Motor Freight, Inc.*, 486 F. 2d 717, 720-21 (7th Cir *cert. denied*, 414 U.S. 1113, 94 S. Ct. 843 (1973); *Aerojet General Corp.* v. *Askew*, supra at 719.

Privity aside, before res judicata can attach and conclusive effect be given the Appellate Division determination, it must be found that the causes of action raised in the state and subsequent federal actions, and the nucleus of facts which underlay them, were identical. *Commissioner of Internal Revenue* v. *Sunnen, supra* at 597, 68 S.Ct. at 719; *Pan American World Airways, Inc.* v. *Civil Aeronautics Board*, 380 F. 2d 770, 776 (2d Cir. 1967), *aff'd sub nom., World Airways, Inc.* v. *Pan American*

World Airways, Inc., 391 U.S. 461, 99 S. Ct. 1715 (1968). While often cast in terms of "identity of issues," the determination as to whether claims are duplicative is not a matter of precision, nor subject to the application of any mechanical formula.

As it is, the applicable test has been variously stated by this and other New York courts; whether a different judgment in the subsequent action would impair the rights created pursuant to the judgment rendered in the prior action, *Moreno* v. *Marbil Productions, Inc.*, 296 F. 2d 543, 545 (2d Cir. 1961), *citing Schuylkill Fuel Corp.* v. *Nieberg Realty Corp.*, 250 N.Y. 304, 306-07, 165 NE. 456, 457 (1929); whether the evidentiary basis of the first and second actions is the same, *United States* v. *Haytian Republic*, 154 U.S. 118, 125, 14 S. Ct. 992, 994 (1894); or whether the essential facts and issues were similarly presented in both cases, *Smith* v. *Kilpatrick*, 305 N.Y. 66, 70-71, 111 N.E. 2d 209, 211-12 (1953), *see gen. Herendeen* v. *Champion International Corp.*, 525 F. 2d 130, 132 (2d Cir. 1975); *McNellis* v. *First Federal Savings and Loan Association of Rochester, New York, supra.*

The crucial element underlying all of these standards is the factual predicate of the several claims asserted. For it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies. *Matthews* v. *New York Racing ASsociation, Inc.*, 193 F. Supp. 293, 294 (S.D.N.Y. 1961). Herein, it is clear that the legal claims presented before the Appellate Division and the district court revolved around the operation of the apprenticeship program and the administrative proceeding that resulted in deregistration. Appellants, before the federal court, presented nothing in the way of evidence that was not before the state court panel. Their challenge concerned the same master training agreement, the same set of hearings, the same regulatory scheme, and the same administrative

order of deregistration that were the subject of United's state court action.

By way of an Article 78 proceeding, the employer association sought to contest the sufficiency of the Industrial Commissioner's findings and the constitutionality of the regulation governing deregistration, 12 N.Y.C.R.R. §601.7(c). In addition, United took issue with appellee's selective use of enforcement powers claiming his failure to commence deregistration proceedings against Local 3 deprived petitioners of equal protection of the laws. The Appellate Division, after a close analysis of the deregistration scheme, held it had a reasonable basis in law and sustained its constitutionality. The evidence, the court found, was sufficient to support the Industrial Commissioner's order. Petitioner's equal protection claim, the court ruled, remained unsubstantiated.

There is no doubt as to the identity of issue between the equal protection claim presented in the state and federal courts. Both the association and the individual contractors alleged that competing contracting firms involved in a master apprenticeship program with Local 3 were guilty of repeated contractual and regulatory violations, but were not subjected to deregistration proceedings by the state. The Appellate Division treated the claim fully rejecting it as without foundation. Their determination is dispositive. *Commissioner of Internal Revenue* v. *Sunnen, supra.*

Moreover, appellants challenge to the constitutional propriety of the regulatory scheme incorporated in §601.7(c) and the deregistration order itself, but mirrored United's state court claim. Appellants' argument, in the context of their challenge to §601.7, that they cannot be held liable for the misdeeds of others misses the mark. We agree that proof of either knowledge or ratification of an association's wrongful acts is crucial to the extension of additional personal liability to its members, *Phelps Dodge Refining Corp.* v. *Federal Trade Commission,* 139 F. 2d

393, 396 (2d Cir. 1943); *Vandervelde* v. *Put & Call Brokers & Dealers Association,* 344 F. Supp. 118, 155-156 (S.D.N.Y. 1972). But appellants' argument misconstrues the thrust and effect of the deregistration order. The subject apprenticeship program finds its derivation in a master training agreement executed by employer and labor associations on behalf of their respective members. This master agreement is to be distinguished from an individual training agreement between a given employer and apprentice. *See* Labor Law § 816 (McKinney's 1965). The Industrial Commissioner, in registering the program, contracted with United and the JAC, not the individual employers. It was the Committee that was recognized by, and answerable to, the state. Similarly, it was the United-Local 363-JAC program that was deregistered, and appellants, in their posture as members of United, are bound by the administrative order of deregistration and state court affirmance. *Hartford Empire Co.* v. *United States,* 323 U.S. 386, 405-06, 65 S. Ct. 373, 383 (1945); *Dunkel* v. *T.B. McDonald Construction Co.*, 67 N.Y.S. 2d 515, 517 (Sup. Ct. 1946).

The terms of the Industrial Commissioner's order direct only discontinuance of the master program. The state withdrew a benefit upon the sponsor's failure to perform conditions that were part and parcel of the benefit conferred. Other than stripping all participants of their right to immediately employ apprentice electricians, the order imposes no additional restriction on any of the appellants. The suspension operates against the employer association and appellants only insofar as they are members. The state is neither seeking to hold these litigants accountable for the acts of others nor impose a penalty.

That there was no evidence of appellants' wrongful involvement is irrelevant when they suffer injury only with relation to their status as members of United. The

requirements of the due process clause are satisfied when association representatives are afforded notice and an opportunity to be heard. *Compare Dunkel* v. *T.B. McDonald Construction Co., supra.* There were no claims peculiar to appellants which required the opportunity to appear personally. *Kersh Lake Drainage District* v. *Johnson, supra* at 494, 60 S. Ct. at 646. Where the representative association has standing to assert the interests of its members, *see Warth* v. *Seldin,* 422 U.S. 490, 95 S. Ct. 2197 (1975), and is found to have adequately protected those interests, any determination rendered against the association is binding on its members. There being identity of parties and issues between the Article 78 proceeding and the federal court action, the decision of the Appellate Division in the prior suit is res judicata as to the matters presented below.

The orders of July 24, 1975 and November 5, 1976 are affirmed.[1]

FOOTNOTES

1. The record does not reveal the identity of the party complaining.

2. Title 12 N.Y.C.R.R. §601.7 provides in pertinent part:

Voluntary and formal deregistration of registered programs. Deregistration of a program may be effected by (a) the voluntary action of the registrant requesting, in writing, the cancellation of the registration, or (b) by the commissioner instituting formal deregistration proceedings in accordance with the provisions of the Part.

(b) *Formal deregistration.* The commissioner may deregister any apprenticeship training program if he finds that the registrant, sponsor, or any participating sponsor has:

(1) Violated a Federal or State Law;

(2) Subverted the program intent by hiring workers as helpers, shop boys or other titles and assigning to them work generally performed by apprentices;

(3) Not conducted, operated, and administered the program in accordance with the intent of article 23, or the registered provisions, or the requirements of this Part, except that deregistration proceedings for violation of equal opportunity requirements shall be processed in accordance with the provisions of Part 600 of Title 12 of the Official Compilation of Codes, Rules and Regulations of the State of New York; or

(4) Made a false or misleading statement in connection with the registration of the program, or is not a person of good character and responsibility.

(c) *Procedure for formal deregistration.*

(1) Where it appears that sufficient cause exists for deregistration, the commissioner shall send a notice to the registrant by registered or certified mail, return receipt requested, stating the following:

(i) The notice is sent pursuant to this section;

(ii) The ground or grounds on which it is proposed to deregister the apprenticeship training program; and

(iii) That the program will be deregistered unless, with 10 calender days of the receipt of this notice, the registrant files with the commissioner a written request for a hearing.

(2) If the registrant requests a hearing, the commissioner shall convene a hearing and issue his determination in accordance with section 601.9 of this Part.

(3) In such determination, the commissioner may allow the registrant a reasonable time to achieve voluntary corrective action.

(4) In each case in which deregistration is ordered, the commissioner shall publish promptly in newspapers of general circulation a notice of the order and shall notify the registrant. In addition, the commissioner shall promptly notify all registered apprentices of the deregistration of the program; the effective date thereof; that such cancellation automatically deprives the apprentice of his individual registration; and that the deregistration removes the apprentice from coverage for State purposes.

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3. Appellant Eugene Iovine, Inc. was charged with failing to use apprentices in the proper ratio and underpayments in the amount of $1,443.60.

4. Title 12 N.Y.C.R.R. §601.8 provides:

"Reinstatement of program registration. Any apprenticeship program formally deregistered pursuant to this Part may not be reinstated for a period not to exceed three years, nor shall the sponsor or any employer or union participant be eligible to register any apprenticeship training program under any other name for such period."

5. Appellants' brief (p. 10) assumed a period of disqualification "for three years from June 2, 1976, namely, until June 2, 1979," based on a notice issued August 2, 1976 by Counsel's Office of the New York State Department of Labor. The record did not present the question as to the method of determining the period of disqualification under Section 601.8 of the Regulations Governing the REgistration of Apprenticeship Programs and Agreements.

MANSFIELD, *Circuit Judge* (Concurring):

I concur in Chief Judge Mishler's carefully considered opinion. I am satisfied that during the period of the suspension appellants are precluded from reregistering either as members of the JAC or in their individual capacities by 12 N.Y.C.R.R. §601.8, which provides:

> "nor shall the sponsor or any employer or union participant be eligible to register *any* apprenticeship training program *under any other name* for such period." (Emphasis supplied).

Since appellants had actual notice of the deregistration proceedings and their authorized representative (who serves as their present counsel) actively participated in those proceedings on their behalf, there was no denial of due process in the application of the regulation.